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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

NO. 745

CENTRAL GREYHOUND LINES, INC., OF NEW YORK,

Appellant,

—*vs.*—

CARROLL E. MEALEY, JOHN F. HENNESSEY and JOSEPH H. MESNIG, Constituting the State Tax Commission of the State of New York.

BRIEF FOR CENTRAL GREYHOUND LINES, INC., OF NEW YORK, APPELLANT.

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(a) INDEX.

Cases:

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(b) Official Report of Opinions Below

This case is cited as Matter of Central Greyhound Lines, Inc., vs. Mealey, 266 App. Div. 648 (New York State Reports) and Central Greyhound Lines, Inc., of New York, Appellant, vs. Carroll E. Mealey, et al., constituting the State Tax Commission, Respondents 296 New York 18 (New York State Court of Appeals Opinion). Leave to appeal to the Court of Appeals by the Appellate Division,

Third Department, was denied, 267 App. Div. 841; but leave to appeal to the Court of Appeals by the Court of Appeals was granted, 292 New York, 723. The remittitur was amended by the Court of Appeals, 296 New York, 638. (Advance Sheets, Official Edition, No. 294, November 16, 1946.)

(c) Statement of the Grounds on Which the Jurisdiction of the Supreme Court of the United States is Invoked

The final judgment of the Court below was entered July 23, 1946 (R. 43), and amended October 15, 1946 (R. 50). The order allowing the appeal was filed October 21, 1946 (R. 60).

The jurisdiction of this Court is invoked under Sections 237 (a), (c) of the Judicial Code of the United States, as amended [Act of February 13, 1925, Chapter 229, 43 Stat. 931, as amended.] (Title 28 U. S. C. A., Section 344 (a), (c); and the Constitution of the United States, Article I, Section 8.

The STATEMENT AS TO JURISDICTION filed with this Court, in this case, referred to Section 237 (a) of the Judicial Code of the United States as sustaining the jurisdiction of this Court (Page 11 of such statement.) On December 23, 1946, this Court issued an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 63). If there be any doubt that this case should be heard by way of appeal in this Court, then appellant submits that it be taken by way of certiorari. (Wilson v. Cook, 327 U. S. 474, 482.)

A decision, a final judgment of the Court of Appeals, New York State, where there was drawn in question the validity of Section 186-a of the Tax Law [1] of that State on the ground of its being repugnant to the Constitution of the United States, (Article I, Section 8), was in favor of its validity.

(d) Statement of the Case [2]

I

THE PROCEEDINGS BEFORE THE NEW YORK STATE TAX COMMISSION AND THE FACTS

A. *The Filing of the Return with, the Petition to, and the Hearing before the New York State Tax Commission.*

(1) The Appellant, Central Greyhound Lines, Inc., of New York, hereinafter referred to as the "Taxpayer" or "Company", is a New York Corporation, engaged in business as a common carrier by omnibus (R. 3, 4). It oper-

[1] This law with its subsequent amendments is set forth in full in the Appendix "A" to this brief.

[2] The Appellant is mindful of the direction of this Court, in its Rule 27, that a "concise" statement shall be submitted. However, the Appellant has construed, it is hoped properly, this Court's Order (R. 63), postponing consideration of the question of its jurisdiction until the hearing on the merits, as an indication that the Court required of the parties further elaboration on the proceedings below. The facts and argument pertaining to the jurisdiction of this Court are set forth at this point.

ates its business both within and without New York State. (R. 4.)

On May 7, 1937, the New York Legislature enacted Section 186-a of the Tax Law.[3] In general terms, the statute required the Taxpayer to pay a tax of 2% on its receipts received in or by reason of any sale made or service rendered to persons for ultimate consumption or use by them in New York State. The first month for which the tax was imposed was July, 1937. On September 13, 1937 the Taxpayer filed a return for the month of July, 1937 with the New York State Tax Commission, the appellee, hereinafter referred to as the "Commission," under Section 186-a of the Tax Law (R. 8-13).

In its tax return, the Taxpayer claimed that revenue received from the sale of tickets for transportation from and to points originating and terminating in New York State but traversing outside the State was not taxable under Section 186-a since it was operating revenue earned in interstate commerce and outside the State of New York. (R. 10, 24.) This is the revenue over which the present controversy ensues in this Court.

The Taxpayer paid its tax on what it regarded as intrastate revenue in the amount of $1,472.45. (R. 9.)

In January, 1940, the Taxpayer, under protest, furnished the Commission with a statement showing its revenue originating and terminating in New York, but passing through Pennsylvania and/or New Jersey, enroute. (R. 13, 14.) In June, 1940, the Taxpayer was notified that it was liable for additional taxes in the amount of $1,688.24 (R. 15, 16) and it immediately filed its petition with the Com-

[3] See Appendix "A".

mission requesting a hearing and that the Commission cancel or reduce the illegal assessment. (R. 16, 17.)

(2) The petition of the Taxpayer alleged that these additional taxes were assessed upon its gross income from sales of transportation service "in interstate commerce originating and terminating within the State of New York, but consumed and used partly within the States of New Jersey and Pennsylvania." (R. 17.) The petition also alleged that the assessment was illegal and void in that "if any portion of said income is subject to taxation under Section 186-a of the Tax Law, the income for services consumed and used within the States of New Jersey and Pennsylvania must be eliminated therefrom and that the income from such services consumed and used without the State of New York constitutes over 50% of such income." (R. 17.)

(3) A hearing before the Commission was held October 20, 1942. (R. 18.) The issue before the Commission was whether Section 186-a applied to a tax on the sales of bus transportation from points originating and terminating in New York State, but traversing outside the State during some portion of the journey, and if the Section so applied, whether or not the receipts should be pro-rated according to the mileage in and out of New York State. (R. 18.)

At the time of the hearing, the disputed revenue involved then totaled $1,839,904.43 for 29 months from July, 1937 through November, 1939. (R. 15.) There was and is also involved the disputed revenue for each month thereafter and to date. The matter is still undecided until this Court makes its decision on the claims asserted by the Commis-

sion under Section 186-a of the Tax Law as amended, which is still in effect for the current operations in the year 1947.[4]

However, it was stipulated, at the hearing, that the proof would relate to operations for the month of July, 1937, but that the judicial result would be applied to all the assessments contested to date. (R. 18.)

The Commission found, as a fact that for the month of July, 1937, the Taxpayer received from bus transportation originating and terminating in New York State, but traversing without that State for some portion of the journey, the sum of $84,412.31, which amount the Taxpayer claimed was not taxable. (R. 34.) The Commission also found that 57.47% of the total mileage of such journeys was traversed within New York State and 42.53% of such total mileage was traversed outside of New York State (R. 34).[5]

B. *The Undisputed facts adduced before the Commission.*

[4] It will be noted that Section 186-a was amended by Laws of 1947, Chapter 89, Section 1, effective April 1, 1947, which made the tax permanent.

[5] Note that the Commission did *not* make a finding that this transportation was solely in fact "continuous." (R. 34.) The fact that a passenger may purchase a ticket for travel between two points in New York State does not mean that he engages in *continuous travel.* Exhibit 7 (R. 29-32) shows much of the travel was not continuous due to layovers, transfers and stop overs.

(1) Geographical Outline of New York State.[a]

The Commission was aware of the fact that the geographical outlines of the State of New York are quite irregular. New York City is the southern-most point of New York State and to its west there is no other territory within the State of New York. Not to labor the obvious, but because it is important in the issues of this case, the Taxpayer emphasizes the peculiar shape of the outlines of New York State. The shortest distance from cities such as Buffalo, New York, Rochester, New York, Syracuse, New York, to New York City necessarily includes the territory of the States of Pennsylvania and New Jersey. In effect, the direct route from any point in New York State to New York City, except from cities directly north of New York City, is the hypotenuse of a triangle and necessarily a portion of the distance on the hypotenuse is within the states of Pennsylvania and New Jersey.

(2) Routes of the Appellant

Many of the routes of the Taxpayer follow roughly a straight line from upstate cities of New York to New York City.

The Taxpayer has many routes which run from a point in New York State to another point in New York State by traversing New Jersey and Pennsylvania. Typical of this sort of route is that between Buffalo and New York City. That route runs from Buffalo to Batavia, New York, to Mount Morris, New York, Dansville, New York, Hornell, New York, Elmira, New York, then to Towanda, Pennsyl-

[a] A map of the territory concerned is included in the "Appendix" to this brief.

vania, then to Scranton, Pennsylvania, and through New Jersey to the Lincoln or Holland Tunnel and into New York City. (R. 24, 25.) Other routes of like nature, are from Binghamton, New York to New York City, which would traverse Pennsylvania and New Jersey. (R. 25.)

The routes "between places in the same State through another State" are included within the definition of "interstate commerce" under "Part II of the Interstate Commerce Act" (Title 49 U. S. C. A. Section 301, 303 (a), (10)) The Interstate Commerce Commission is granted the power to issue a Certificate of Convenience and Necessity (Part II of the Interstate Commerce Act, Title 49 U. S. C. A. Section 306 (a), (b)) [7]

(3) The Only Evidence of the Type of Revenues in Dispute

At the hearing, the Taxpayer introduced as evidence, an undisputed exhibit showing "Receipts from Interstate Business which Originates and Terminates in New York State, Month of July, 1937." (R. 29-32).[8] This exhibit showed for the month of July, 1937, all receipts on tickets which were purchased originally with a point of origin and

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[7] See Garrison v. Paramount Bus Corporation, 223 N. Y. App. Div. 75, 77; Pine Hill-Kingston Bus Corp. v. Davis, 225 N. Y. App. Div. 182, 183.

[8] The detailed analysis of the exhibit is required for the understanding of the type of interstate transportation involved and as a background for the distinguishing of cases, said by the Commission to support the validity of the Statute, as applied. See Point IV herein for the cases.

termination in New York State, but where a portion of the travel was through other states.

On the left-hand side of the page (e. g. R. 29) appears the name of a city as Buffalo. This indicates that tickets were purchased from Buffalo to New York City. The second column on this page designated "(1)" indicates the distance from Buffalo to New York City, to wit: 386.2 miles, and the third column on this page, designated "(2)" shows the mileage traversed between Buffalo and New York within New York State, to wit: 172.7 miles, so that it appears that on a run from Buffalo to New York City, 213.5 miles are traversed within Pennsylvania and New Jersey. Put another way, 44.72% of the actual distance of the route is within New York State and 55.28% is within the territory of Pennsylvania and New Jersey.

It will be observed that the fourth column of this exhibit breaks down the percentage of travel within New York State. The fifth column of the exhibit shows the total revenue obtained during the month for the run from the city named in the left-hand column to New York City. The last column on the exhibit, in dollars and cents, shows the amount of the revenue apportioned to New York State on the basis of the percentage of the mileage traversed within New York State to the total gross receipts for the entire route. This explanation of the exhibit appears in the testimony before the Commission (R. 21 and on the first thirteen lines of R. 22).

On the first page of this exhibit (R. 29) there are listed certain cities in the left-hand column which are located in the States of Pennsylvania and New Jersey, e. g., Port Allegany, Pennsylvania (which is the 17th city listed from the bottom of R. 29). This means that a ticket was sold

from or to New York City to another point in New York State, but a passenger boarded a bus on that ticket at Port Allegany.

Port Allegany, Pennsylvania is *also* listed on another page of the exhibit (R. 31—the 18th city listed from the top of that page). A passenger traveled from Port Allegany, Pennsylvania to East Aurora, New York. He took a New York-Cleveland, Ohio run from New York City on a ticket sold in two tears, one tear reading "from New York City to Port Allegany" and the other tear reading, "from Port Allegany to East Aurora." (East Aurora is in New York State) (See the explanation of this Port Allegany example in the testimony before the Commission at R. 22).

In further explanation of the exhibit, reference is made to R. 32, in the middle of the page, where three foot notes are keyed to certain Receipts. Foot note (a) refers to receipts which, by the nature of the composition of the exhibit, were not included in the preceding portion of the exhibit because of the difficulties of compilation in matching certain tickets with the final destination of the passenger where there had been a lay-over. (R. 26.) Foot note (a) however, reports the revenue received from a ticket purchased from a point within to a point within New York State but picked up by a bus driver on his trip which was scheduled to go into New York City. Typical of this situation would be a ticket purchased for a trip from Syracuse to New York City where a passenger decided to stop over in Binghamton, got off the bus at Binghamton and the bus driver drove on to New York City and made his report. (R. 26.) Whether that passenger ever used that portion of the ticket from Binghamton to New York City has not been determined. It will be noted that this revenue is, for convenience purposes, and without any concession as to the

propriety of the allocation, charged as revenue within New York State.

Foot note (b) reports receipts from a ticket purchased for a point within to a point within New York State, but picked up by a bus driver whose bus was not scheduled to run into New York City. Typical of this sort of situation is where a passenger buys a ticket from Watertown to New York City and transfers at Syracuse since the run stops there. This receipt, for the reasons previously stated, also is allocated to New York State.

Lastly, the (c) foot note refers to revenue from a ticket purchased from a point within to a point within New York State, but picked up by a bus driver on a run which starts outside of New York State. Typical of this situation is where one purchased a ticket from East Aurora to New York City, came to Port Allegany, Pennsylvania and there boarded a bus which took him to New York City. The revenue from that ticket is charged to interstate revenue outside of New York State. None of the revenue in these three foot notes is included in the revenue set opposite the names of specific cities. (R. 26, 27.)

It is obvious from this exhibit that there are innumerable stop-overs outside of New York State and in Pennsylvania and New Jersey. (R. 25.) Even though the ticket be purchased originally for a point within to a point within New York State, there are lay-overs and transfers. (R. 32.) If a passenger originated in Binghamton, New York, destined to New York City, he could decide when he got to Jersey City that due to sickness or any other reason, he wanted to stop off in Jersey City, in which instance the driver would punch his ticket and made a notation showing that he had ridden from Binghamton to Jersey City. (R. 25.) It follows that the passenger might well make this

stop over at Scranton, Pennsylvania or any other city in Pennsylvania or New Jersey. Two tear tickets might be used, for example, if a passenger knew when he left Binghamton, even though he eventually wanted to go to New York City, that he wanted to stop over in Jersey City. (R. 26.)

It is evident that the transportation of a passenger from a point within to a point within New York State traversing the territory of New Jersey and Pennsylvania involves considerable transportation outside of New York State. The composite mileage for the month of July, 1937, indicated that 42.53% of the total mileage was traversed outside of New York State. (R. 34.) The transportation of a passenger from a point within to a point within New York State also involves lay overs, stop overs and transfers in the territory of Pennsylvania and New Jersey. All of the activities that are implicit in the driving of a bus, the maintenance of stations, and arrangements for stop overs, lay overs and transfers are more than mere automaton-like.

C. *The Commission's Conclusions of Law.*

In the light of this evidence, the Commission found as conclusions of law that Section 186-a of the Tax Law applied to such bus transportation originating and terminating in this State and that the Section, so construed, violated neither the Federal or State Constitutions, and that the receipts from such transportation should not be prorated according to the mileage traversed in and out of this State.[9]

[9] Here, clearly, from the language of the Commission, it appears that the Taxpayer's challenge to the validity of the Statute, as applied, was considered and necessarily decided. (R. 34.)

II

THE PROCEEDINGS BEFORE THE APPELLATE DIVISION AND THE COURT OF APPEALS

(1) The Taxpayer immediately sought a review of the determination of the Tax Commission which was made January 27, 1943 (R. 33), and filed a petition under Article 78 of the Civil Practice Act of the State of New York. This petition, originally filed in the Supreme Court of New York, Albany County (which was thereupon transferred to a term of the Appellate Division for the Third Judicial Department (R. 3, 2)), alleged that additional taxes were assessed upon the gross income of the petitioner from sales of transportation services in interstate commerce (R. 4) and further alleged that the determination of the Commission was contrary to statute, unconstitutional, illegal and erroneous. The petition claimed that the assessment upon the income in dispute was illegal and void, was not authorized by statute and alleged further, that if any portion of the income was subject to tax under Section 186-a the income from services consumed and used within the States of New Jersey and Pennsylvania must be eliminated therefrom. (R. 4, 5.)

The Answer and Return of the Commission put in issue, by denial, the allegation that the transportation referred to, constituted interstate commerce. (R. 6.) The Commission's pleading also denied that the determination of the Commission was contrary to statute and was unconstitutional. (R. 6.)

The Appellate Division rendered its opinion for confirmation (266 App. Div. 648) (R. 38-40.)

Reserved for consideration under the ARGUMENT set forth in this brief are the various conclusions of the Appellate Division pertaining to the nature of the tax and its characterization of the transportation. Here, we emphasize the comment of that court with respect to the constitutional question involved. The court said:

> In the light of the federal decisions we see no merit to the contention of petitioner that Section 186-a of the Tax Law as above construed is a violation of the interstate commerce clause of the Federal Constitution." (R. 39, 40.)

That court set forth that the Taxpayer argued before it, that if the receipts from the sale of utility services for use partly within and partly without the state are taxable under Section 186-a when the journey originates and terminates in New York State:

> "* * * then the tax must be limited to the revenue attributable to the mileage in New York State, otherwise the statute is unconstitutional and a violation of the interstate commerce provision of the Federal Constitution." (R. 39.)

Lastly, the Appellate Division, in its reference to the question of the validity of the statute in the light of constitutional objections urged, stated that this was a tax for the privilege of doing business in New York State measured by gross income. Consequently, the Court concluded there was no "burden" upon the particular business here sought to be exempted. (R. 40.)

The Taxpayer applied to the Appellate Division for leave to appeal to the Court of Appeals and its application was denied (R. 41) (267 App. Div. 841) and thereafter petitioned the Court of Appeals for leave to appeal to that

Court and its motion was granted. (R. 36) (292 New York, 723.)

(2) After argument on the merits, the Court of Appeals handed down its decision (R. 44-50) and concluded:

> "There is no constitutional objection to taxation of the total receipts here. This is not interstate commerce. (Lehigh Valley Case, supra; People ex rel. Cornell Steamboat Co. v. Sohmer, 235 U. S. 549; Ewing v. Leavenworth, 226 U. S. 464.) * * *." (R. 49, 50.)

The Taxpayer moved to amend the remittitur and the remittitur was amended by the Court of Appeals to state the following:

> "A question under the Federal Constitution was presented and passed upon by this Court, viz. whether Section 186-a of the Tax Law of the State of New York, as construed by the Tax Commission. is repugnant to the interstate commerce provision of the Federal Constitution, Article I, Section 8. This Court held that the aforesaid statute as so construed is not repugnant to that provision of the Federal Constitution." (R. 50.)

In its brief, in the Court of Appeals, the Taxpayer made reference to the constitutional question and cited the very cases referred to in the opinion of the Court of Appeals and quoted therefrom, adding that the commerce concerned in the cited cases was in fact interstate commerce and that the States had only limited powers in respect to it. (Page 5 of the brief dated November 25, 1946, filed in this case, by petitioner-appellant in opposition to Motion to Dismiss or Affirm in the Supreme Court of the United States.)

The Court of Appeals construed the statute to permit the taxation of the revenue herein disputed. That Court stated that there was no constitutional objection to the taxation of those receipts. (R. 55).[10] Thus it necessarily passed upon the validity of the state statute which had been drawn in question on the ground that the statute was repugnant to the constitution.

The Court of Appeals decision was in favor of its validity, the appellant having launched its attack upon the validity of the statute as applied.[11] The language of the Appellate Division Opinion and the amended remittitur are proof that there was no waiver of this position. Reserved for consideration under the ARGUMENT set forth in this brief, are the various conclusions of the Court of Appeals pertaining to the nature of the tax, its characterization of the transportation. and the cases in the United States Supreme Court therein cited.

III

THE PROCEEDINGS BEFORE THE UNITED STATES SUPREME COURT, IN THIS CASE, ON THE PETITION FOR APPEAL

In accordance with the applicable statutes and the Rules of this Court, the appellant filed with the Chief Judge of

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[10] The opinion quoted the findings of the Commission that Section 186-a so construed violates neither the Federal nor State Constitutions. (R. 46.) (See also footnote 9.)

[11] See Memphis Natural Gas Co. vs. Beeler, 315 U. S. 649, 651.

the Court of Appeals of the State of New York, its petition for appeal (R. 52-57), obtained an order thereon (R. 60), filed its assignments of errors (R. 57-59) and its Statement as to Jurisdiction (see Statement as to Jurisdiction separately printed in this case). The Commission filed a Statement Opposing Jurisdiction and Motion to Dismiss or Affirm to which the Taxpayer filed its brief in opposition (see such brief separately printed). In accordance with Rule 12, as amended, of the Rules of this Court, the Taxpayer pointed out the grounds on which it contended that the questions involved were substantial. (See pages 6-9, Paragraphs 9-12 of Statement as to Jurisdiction filed in this case.)

The taxing statute involved herein has now been made permanent (Laws of 1947, Chapter 89, Section 1, effective April 1, 1947). Involved in effect, is the tax on the revenue disputed from June, 1937 to date (R. 18). Others engaged in the transportation of passengers across state lines will be affected by a decision in this case and the Taxpayer, in its own right, maintains a large volume of traffic between New York City and the central and western parts of the State of New York which passes through the States of New Jersey and Pennsylvania. (See Page 6, paragraph 9 of the Statement as to Jurisdiction.)

The questions involved are substantial, affecting the adjustment between burdens on interstate transportation and "gross receipts taxes" imposed by the state for revenue.

Not alone are the rights of the parties to this appeal involved, but the questions involved are substantial.

As this Court has indicated in Zucht v. King, 260 U. S. 174 (referred to in Paragraph 1 of Rule 12, as amended,

of this Court), if there is a substantial question as to the validity of the statute, it will hear the case on the constitutional question.

Taxpayer submits that there is no precedent in the decisions of this Court which can sustain the decision below and, in fact, the decisions of this Court require a reversal.

The cases cited by the Court of Appeals below to sustain its decision, (Lehigh Valley Railway v. Pennsylvania, 145 U. S. 192; United States Express Co. v. Minnesota, 223 U. S. 335; Hanley v. Kansas City So. Railway Co., 187 U. S. 617; State of Minnesota v. United States Express Co., 114 Minn. 346; People ex Rel. Cornell Steamboat Co. v. Sohmer, 235 U. S. 549; Ewing v. Leavenworth, 226 U. S. 464 (R. 48-50)) are distinguishable, as was indicated in the "Statement as to Jurisdiction" (Pages 7-9 and "Brief by Petitioner-Appellant in Opposition to Motion to Dismiss or Affirm" (Pages 5-8).[12]

The problem involved of state taxation by *gross receipts* of interstate transportation has long been recognized as involving substantial questions of law, to be resolved, in their constitutional aspect, by this Court. The question becomes of greater concern by the disposition of the states to impose such taxes with greater frequency in recent

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[12] These cases are discussed under Point IV of the ARGUMENT in this brief. It would be duplication to review these cases at this point, since, together with the "Gross Receipts Tax" cases, they constitute the argument on the merits.

years.[13] There is need for further precision regarding the scope of previous rulings on the power of the State to levy such gross receipts taxes.

(e) Specification of Assigned Errors Intended to be Urged

The Appellant specifies that the Commission erred in its determination, by its conclusions of law, and the Courts below erred in confirming and not reversing such determination, that,

> "Section 186-a of the Tax Law applies to such bus transportation originating and terminating in this State; that that such section, so construed, violates neither the Federal or State Constitutions, and that the receipts from such transportation should not be prorated according to the mileage traversed in and out of this State." (R. 34) (See Assignment of Errors at R. 57, 58, 59, Nos. 1, 11, 12 and 13).

The Appellant further specifies that the Courts below erred in holding that there was no constitutional objection to the taxation of the total receipts involved. (See Assignment of Errors, Nos. 2, 6, 13, R. 57, 58 and 59).

The Appellant further specifies that the Courts below erred in holding that Section 186-a of the Tax Law was valid, as applied, or construed, and did not violate the constitutional rights of the Appellant (See Assignment of

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[13] "State Gross Receipts Taxes," Dunham, 47 Columbia Law Review, 211, 226; "Gross Receipts Taxes on Transportation," Lockhart, 57 Harvard Law Review, 40, 42, footnote 11.

Errors, Nos. 3, 4 and 7, R. 57, 58). *Per contra*, the Courts below erred in not holding that the law, as construed, was repugnant to Article I, Section 8 of the Constitution of the United States. (See Assignment of Errors, No. 9, R. 58).

The Appellant further specifies that the Courts below erred in refusing to hold that the tax assessed and as laid was repugnant to the Constitution of the United States and, *per contra*, by holding that the tax laid was valid. (See Assignment of Errors, 10 and 4, R. 58, 59).

The Appellant further specifies that the Courts below erred in holding that the transportation involved is not consumed or used partly within or partly without the State of New York (See Assignment of Errors No. 5, R. 58), and thus was not "interstate commerce."

(f) ARGUMENT

Summary.

The transportation here involved is "interstate commerce." Passengers purchase tickets with stated terminii in New York State, but are carried into, from (on stop overs, lay overs, and transfers) and through Pennsylvania and New Jersey. Such travel is "commerce."

The Statute, as construed, would tax directly gross receipts on such commerce under the guise of a privilege tax for doing business in New York. The Statute, as applied, is unconstitutional, because it is not a privilege tax for doing a local business, or on a local event, as appears from the language of the Statute, and because it is unapportioned and imposes not alone the risk, but the fact, of cumulative burdens on interstate commerce.

If such Statute be deemed not wholly invalid, then the receipts for the portion of the travel outside of the State of New York may not be taxed. The taxation of receipts for travel only within New York State would mitigate the multiple burdens involved.

The cases cited by the Courts below are distinguishable and emphasize the need for apportionment.

Because this case involves substantial issues concerning the accommodation between the needs of a State for revenue (by imposing a gross recipts tax) and the needs of the Nation for freedom from direct interference with interstate commerce, this Court should take jurisdiction and determine the question by reversing the Court below.

I.

The transportation here involved is interstate commerce.

Early this Court said that "a tax upon fares • • • received for transportation is virtually a tax upon the transportation itself" (Philadelphia & S. M. S. S. Co. vs. Commonwealth of Pennsylvania, 122 U. S. 326 at 340). The transportation here was "interstate commerce."

From a factual standpoint, it cannot be denied that the activity of transportation, by common carrier, of persons, across state lines, into other states, is interstate business. The fact that the transportation, by route of travel, is such that both the point of origin and termination are within a single state, where a portion of the route is travelled outside the single state, makes it no less "interstate commerce" (Hanley vs. Kansas City Southern R. Co., 187 U. S. 617; Western Union Telegraph Co. vs. Speight, 254 U. S. 17; Garrison vs. Paramount Bus Corp., 223 N. Y. App. Div. 75, 77; Pine Hill-Kingston Bus Corp. vs. Davis, 225 N. Y. App. Div. 182).

In the case at bar tickets are sold in accordance with tariffs published and filed with the New York State Public Service Commission (R. 19). Passengers purchased tickets for travel from a point within to a point within New York State, but a portion of the travel was in New York and New Jersey (R. 21). Some passengers boarded buses in Buffalo, New York, for example, and remained on the bus while travelling through the states of Pennsylvania and New Jersey to the point of destination, New York City (R. 20). Other passengers, having purchased a ticket for transportation from Binghamton, New York to New York City,

boarded the bus at Binghamton but got off at Jersey City, New Jersey (R. 25). Later, perhaps the next day, that same passenger boarded another bus in Jersey City and rode into New York City (R. 25, 26). Other passengers bought tickets for transportation from other cities in Upstate New York to New York City, but stopped over in Pennsylvania and New Jersey and later boarded buses in Pennsylvania and New Jersey for transportation into New York City (R. 29-32).

The transportation of passengers, in this case, is not solely the conducting of a "continuous"[11] travel on a single trip from a point within to a point within New York State, traversing a portion of other states.

Tickets contain stopover privileges (R. 25). Passengers lay over (R. 32), and they transfer or change buses in Pennsylvania and New Jersey (R. 22). The bus, ridden by those who purchased these tickets, the revenue for which is here in issue, travels the highways of Pennsylvania and New Jersey for 42.53% of the entire journeys.

The Court will recognize that bus lines do not operate without terminal facilities. The activities of the Taxpayer in Pennsylvania and New Jersey in furnishing such facili-

[11] See the factual distinction concerning "continuous carriage" and that there was no "breaking of bulk or transfer of passengers in New Jersey," made by the Court in Lehigh Valley R. Co. vs. Pa., 145 U. S. 192; see N. Y. ex rel Cornell Steamboat Co. vs. Solmer, 235 U. S. 549, where the decision is barren of any reference of any out of state activity except the attaching of a tow line and plying the waters of a navigable river. These cases are analyzed at Point IV of the ARGUMENT herein.

ties to passengers from New York State as a part of the price of the tickets here involved are, in themselves, substantial proof that the Taxpayer is engaged in a wealth of interstate activity, interstate commerce.

There is no claim here, and there could be none, by the Commission that the routes traversed outside of New York were unreasonable or a subterfuge for the purpose of taking advantage of Federal rights. The routes here followed were subject to the approval of the Interstate Commerce Commission (Part II Interstate Commerce Act; Title 49 U. S. C. A., Section 306).

Routes which traverse the territory of another state, though the termini are within still another state, are expressly covered within the definition of "interstate commerce" under the last-cited statute (see Title 49 U. S. C. A. Section 303(10)).

These out-of-state routes were not taken with the "obvious direct intrastate" routes open.[15] The direct route was and is the out-of-state route, and the journey in Pennsylvania and New Jersey is no "detour." [16]

Here, then, factually, and as a matter of law, was "interstate commerce." [17]

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[15] See Wooleyhan Transport Co. vs. George Rutledge Co., U. S. C. C. A. 3rd, decided July 14, 1947, official report unavailable.

[16] See that reference in Lehigh Valley R. Co. vs. Pennsylvania, 145 U. S. 192.

[17] Lest there be any misunderstanding, it is noted that the issues in this case do not involve the validity of state taxes and regulations other than a gross income (receipts) tax as here imposed.

II.

The statute, as applied and construed, imposes an unconstitutional, direct, unapportioned gross receipts tax on interstate transportation, commerce.

It having been established that the tax on the revenue of transportation was a tax on the transportation itself, which constituted "interstate commerce," (Point I) the Taxpayer now demonstrates that the State was without power to impose such a tax.

It has long been settled that a direct, unapportioned tax on gross receipts from interstate commerce is beyond the state taxing power. The reasons underlying this rule have been stated, and each reason assigned in the cases to be cited applies to the case at bar. It must be remembered in this case the activity in which the Taxpayer is engaged is interstate commerce, i. e., the receipts here sought to be taxed directly are from interstate transportation.

A. *The Tax, as Construed, is not on a "local activity," but is a Direct Tax on the Gross Receipts of Interstate Commerce.*

The tax imposed here is "direct." It is a tax on that part of the revenues of journies, e. g., from Buffalo to New York, which is derived from furnishing transportation through Pennsylvania and New Jersey.

The tax cannot be disguised [18] or camouflaged by calling

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[18] Galveston H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227.

it an "indirect" tax on interstate commerce or by the use of magic words that it is a tax for the privilege of doing business in New York.[19] The Appellate Division below stated that there was no burden here because it was a tax on that privilege for doing business in New York (R. 40). Nevertheless, if words are to correspond with things,[20] the tax here is upon the *gross receipts* of revenue from travel *outside* of the State of New York.

It is a direct contradiction to say that the tax is on the privilege of doing business in New York when in fact the revenue sought to be taxed and justified on that theory, is for the doing of business in Pennsylvania and New Jersey. The so-called "taxable event" is not the doing of business, or engaging in an occupation which by its *very nature* is limited to the territorial confines of the State of New York. (Gwin, White and Prince v. Henneford, 305 U. S. 434.) The business of transportation or the occupation of engaging in it, is one which involves, where the routes go outside of the state, transportation outside of the state.

The tax in this case is not one for the use of highways (See Dixie Ohio Express Co. v. State Revenue Commission, 306 U. S. 72). The statute here states that it is applicable regardless of "whether use is made of the public streets" (See Subdivision 2 of the statute in Appendix "A"). In passing, it is noted that where the tax is said to be laid for

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[19] A tax may not be misdescribed to render valid one which is invalid. McLeod v. J. E. Dilworth Co., 322 U. S. 227, 331.

[20] Freeman v. Hewitt, 329 U. S. at 258.

the use of the highways, it may not be disproportionate to the local activity. (McCarroll v. Dixie Greyhound Lines, 309 U. S. 176).

The statute here is not a tax imposed "in lieu" of all other taxes, for its language states that it shall be "in addition to any and all other taxes and fees imposed by any other provision of law." (See Subdivision 1 of the statute in Appendix "A," and see comparable language in Meyer v. Wells Fargo Co., 223 U. S. 298, 299; McHenry v. Alford, 168 U. S. 651.)

It becomes important to determine the subject of the tax in order to perceive clearly the lines of authority which this Court has laid down in gross receipts tax cases,[21] for certainly emphasis has been placed, by this Court, upon the subject of the tax as well as upon its nature or admeasurement.

The determination by the Courts below that the tax was of a nature of one imposed for the "privilege of doing business" (R. 40), is not binding upon this Court (United States Express Co. vs. Minnesota, 223 U. S. 336; Galveston H. & S. A. R. Co. vs. Texas, 210 U. S. 217; New Jersey Bell Telephone Co. vs. State Bd. of Taxation and A. of N. J., 280 U. S. 338, 346, 347.)

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[21] "Gross Receipts Tax on Transportation," Lockhart, 57 Harvard Law Review 40; "More Ado about Gross Receipts Taxes," Powell, 60 Harvard Law Review 501; Western Livestock v. Bureau of Revenue, 303 U. S. 250, 256; Joseph vs. Carter & Weeks Stevedoring Co., 330 U. S. 422; Freeman vs. Hewitt, 329 U. S. 249.

The statute, in the case at bar, does not say that the tax is imposed for the privilege of doing business. The statute is captioned "Emergency Tax on the Furnishing of Utility Services."[22] The words "doing business" appear in the statute only with reference to a description of the "utility" upon which the tax is imposed.[23] Apparently only "utilities" which includes "persons,"[24] doing business in New York State are subject to the tax, but that is not to say that the tax is imposed for the *privilege* of doing business.

The statute is not designed as a privilege tax because, on its face, it qualifies the services rendered, and upon which the tax is imposed, by stating "regardless of whether such activities are the main business of such person or are only incidental thereto."[25] True, what may be "incidental" to a main business and may in and of itself be a substantial business but that the legislature had no such thought in mind is indicated in the legislative intent which states that the tax was imposed on whether such services were the main or *incidental part of their business.* (See "INTENT" Appendix "B" herein.) Therefore it

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[22] The word "emergency" has now been eliminated by the Laws of 1947, Chapter 89, Section 1.

[23] See Subdivision 1 of the statute in Appendix "A" herein.

[24] See Subdivision 2(b) of the statute in Appendix "A" herein.

[25] See Subdivision 2(a) of the statute in Appendix "A" herein.

seems far-fetched to conclude that this is a tax on the privilege of doing business, when the activities upon which the tax is imposed need be only "incidental."

The tax was originally an emergency tax to aid in financing the extraordinary cost of relief.[26] Apparently, in the search for revenue, the Legislature seized upon the business of "utilities." But strangely silent is the statute on any recital or statement that the *quid pro quo* for the imposition of the tax was the privilege of furnishing the services.

It is concluded that by the very terms of the statute, it is not a tax on the privilege of doing business, i. e., furnishing utility services.

This Court pursued a line of inquiry in another case (Adams Mfg. Co. v. Storen, 304 U. S. 307, 310) in examining the *subject* of the tax, which is helpful, in the process of exclusions, in determining the *subject* of the tax of the case at bar.

(1) The tax in the case at bar is not an excise tax for the privilege of domicile, since it is levied upon the gross income of non-residents as well (see Appendix "A", of this brief).

(2) It is not for the transaction of business since in many instances it hits the receipts of income by one who only conducts an activity which is "incidental" to his business.

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[26] See Appendix "B" of this brief for the "Legislative Intent."

(3) It is not a charter fee and this is so because charter fees of the taxpayer are paid under the Franchise Tax Law (Section 184 of the New York Tax Law).

(4) It is not an excise upon the privilege of doing business since, as stated above, the statute does not say so, and even if it did the state may not impose a tax on the privilege or occupation of engaging in interstate commerce (Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; Pickard v. Pullman So. Car Co., 117 U. S. 34; Robbins v. Shelby, County Taxing District, 120 U. S. 489; Fargo v. Michigan, 121 U. S. 230; Cooney v. Mountain States Tel. & Tel. Co., 294 U. S. 384; Fisher's Blend Station v. State Tax Commission, 297 U. S. 650; General Trading Co. v. State Tax Commission of Iowa, 322 U. S. 335).

(5) It is not a tax in lieu of *ad valorem* taxes for, as stated above, the statute does not forgive or reduce all other state taxes paid by the taxpayer, nor does it seek to impose a property tax (cf: United States Express Co. v. Minnesota, 223 U. S. 335; Cudahy Packing Co. v. Minnesota, 246 U. S. 450; Pullman Co. v. Richardson, 261 U. S. 330; Illinois Central R. R. v. Minnesota, 309 U. S. 157).

In summary, it is concluded that this tax is *a privilege tax upon the receipt of gross income* just as the Court concluded was the tax in the *Adams* case, 304 U S. at 311. (See also Department of Treasury v. Wood Preserving Corp., 313 U. S. 62, 66.)

As a tax based on the privilege of receiving gross income —a tax upon gross receipts from commerce, being unapportioned, it must fall.

The tax is upon the business of interstate transportation which is unlike the business of manufacturing where the total activities of the process of manufacturing are carried on within a single state. (See American Manufacturing Co. vs. City of St. Louis, 250 U. S. 459, which has been explained in J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 312, 313, also in Gwin, White and Prince v. Henneford, 305 U. S. 434, 440, and in Freeman v. Hewitt, 329 U. S. at 258. Neither is the business of engaging in transportation across state lines akin to the business of preparing, printing, and publishing magazine advertising, which is peculiarly local. (Western Livestock v. Bureau of Revenue, 303 U. S. 250, 258.) In that case, it is noted, that while the tax was sustained on the "peculiarly local" activities of the company, which were the subject for the tax, a gross receipts tax on subscriptions of the magazine was not in issue, and had such been the case the result might well have been different. (See Department of Treasury v. Ingram Richardson Mfg. Co., 313 U. S. 252, 255.)

The appellee Commission can take no comfort in the more recent decisions of this Court which sustained a sales tax of New York City (McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33). The tax was sustained because it was conditioned upon a local activity which was the delivery of goods within the state, and the force of decisions, such as the *Adams* case, prior to the New York City sales tax case, has not been "sapped" by such decision. (Freeman v. Hewitt, 329 U. S. at 257.) The "use" tax cases are limited by their very nature. They are levied on "intrastate use after the completion of an interstate sale." (International Harvester Co. v. Department of Treasury, 322 U. S. 340, 347; Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62, 67; Southern Pacific Co. v. Gallagher, 306 U. S. 167.)

It has been said that the line of demarcation, of unapportioned gross receipts taxes sustained and those not sustained, appears to rest upon whether the subject of the tax is identified with intrastate commerce or interstate commerce.[27] Here there is no trouble in identifying the subject taxed as interstate commerce, i. e., the transportation of persons across state lines. The tax is one directly on it, not on a local event.

B. *Since the Tax, as Construed, is a Direct Tax on Interstate Commerce and Since it is Unapportioned, it Must Fall.*

Gross receipts taxes on commerce (interstate transportation), unapportioned and not imposed in lieu of other taxes, or fairly upon a local taxable activity, are invalid. (Philadelphia and So. S. S. Co. v. Commonwealth of Pennsylvania, 122 U. S. 326; Ratterman v. Western Union Telegraph Co., 127 U. S. 411; Case of State Freight Tax, 15 Wall. 232; Fargo v. Michigan, 121 U. S. 230; Galveston H. & S. A. Ry. v. Texas, 210 U. S. 217; Meyer v. Wells Fargo, 223 U. S. 298; Western Union Telegraph Co. v. Kansas ex. rel. Coleman, 216 U. S. 1; New Jersey Bell Tel. Co. v. State Bd of Taxes and A. of New Jersey, 280 U. S. 338; Fisher's Blend Station v. State Tax Commission, 297 U. S.

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[27] See "State Taxation and the Commerce Clause." Traynor, 28 California Law Review, 168, 175.

650; Puget Sound Stevedoring Co. v. State Tax Commission, 302 U. S. 90).[28]

Here in the case at bar, no pretense is made of apportionment. The statute makes no reference to apportionment and the State Tax Commission below refused to apportion (R. 34), although a basis for apportionment by actual break-down of routes traveled, was furnished by the Taxpayer. The tax here, as construed, since it is unapportioned, must fall in view of the authorities just listed.

C. *Since the Tax as Construed Places on Commerce the Risk and Fact of Cumulative Multiple Burdens, it Must Fall.*

The reason for the announced rule of this Court for condemning such unapportioned taxes has been said to obviate multiple or double taxation.[29] In the *Western Livestock*

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[28] The following cases sustained a gross receipts tax and are here cited with parenthetic comment to indicate their inapplicability: U. S. Express Co. v. Minnesota, 223 U. S. 335 (in lieu of other taxes); Cudahy Packing Co. v. Minnesota, 246 U. S. 450 (in lieu of other taxes); Coverdale v. Arkansas-Louisiana Pipe Line, 303 U. S. 604 (privilege of producing power—local); Ford Motor Co. v. Beauchamp, 308 U. S. 331 (apportioned); Department of Treasury v. Wood Preserving Corp., 313 U. S. 62 (local sale, no case for apportionment); Maine v. Grand Trunk Ry. 142 U.S. 217 (apportioned); See the comment on the "use" and "sales" tax under par. A of this Point.

[29] "State Tax Barriers to Interstate Trade," Lockhart, 53 Harvard Law Review, 1253, 1261.

case, 303 U. S. 250, at 260, this Court indicated that by sustaining the tax in that case, a further tax upon the same event cannot be imposed elsewhere. The Court then had in mind taxes laid upon gross receipts derived from interstate transportation because it agreed with the "objection" which has been leveled at such taxes in transportation cases, the danger of *multiple taxation*.

The fears of multiple taxation which may serve as a basis for striking down taxes on transportation companies are more than fanciful in the case at bar. Here there is not alone the threat, but the fact, of imposition by another state on the very revenue taxed here.[30] *Pennsylvania imposes a gross receipts tax upon taxpayers such as the appellant* in the case at bar and measures such gross receipts by the fraction of the number of miles traveled in the State of Pennsylvania over the total number of miles of the carrier times the interstate receipts of the carrier.[31] (See in Appendix "C" to this brief, a portion of the Pennsylvania statutes.) Translated into the facts of this case, if the New York State tax were sustained, the Taxpayer would be taxed doubly on the same revenue and travel. For example, if New York may tax the revenue derived for travel within Pennsylvania and New Jersey on a ticket bought for terminii points between Buffalo and New

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[30] "The bridge has been crossed," a journey not taken in International Harvester Co. v. Department of Treasury, 322 U. S. 340 at 348.

[31] See for the proper "numerator," International Harvester Co. v. Evatt, 329 U. S. 416.

York, then Pennsylvania also taxes that revenue. It appears that Pennsylvania includes the mileage within Pennsylvania in the numerator of a fraction and the total gross receipt of the run from Buffalo to New York is multiplied by the fraction to determine the apportioned tax.

See appendix "C" to this brief where pertinent provisions of Pennsylvania Franchise statutes are printed and it will be noted that its method of calculation includes a fractional device, which, if the tax here be sustained, might well be modified.

The fact of multiple taxation, in this case is sufficient, it is submitted, to condemn the act of New York State under the reasons advanced by the majority of this Court in its opinions (see cases cited in Gwin, White & Prince v. Henneford, 305 U. S. 434, 439), or by reason of the decisions in the concurring or dissenting opinions. If this be a direct, unapportioned tax on gross receipts, then the inquiry into actual multiple burdens may be unnecessary. (See Freeman v. Hewitt, 329 U. S. at 256). Since it is an unapportioned tax, it must be condemned. (Freeman v. Hewitt, 329 U. S. at 259.) Since it is a "tax on interstate transportation" and "an exaction on property in its interstate journey," it must be condemned (329 U. S. at 286).

Since the transportation here is, of itself, interstate commerce, it must be condemned even if the threat of a multiple burden is absent (Joseph v. Carter & Weekes Stevedoring Co., 330 U. S. 422). Neither the *activities* nor the *gross receipts* of the Taxpayer are here apportioned, and stripping this case of "matters of form" the tax threatens harm to interstate commerce and will harm and does harm interstate commerce because of the multiple

burdens imposed and must thus be condemned. (Joseph v. Carter & Weeks Stevedoring Co., 330 U. S. at 443).

Thus, this is not a case which concerns only the state of origin of travel. It concerns the power of other States to make like exactions. (This was not a consideration in the *Lehigh Valley* case, 145 U. S. 192, where the tax was apportioned.)

It is no answer to say that local commerce is subjected to this same gross receipts tax (Freeman v. Hewitt, 329 U. S. at 254). Given, a non-discriminatory tax, (as to products or transportation limited to the confines of a single state) such explanation may have merit. But involved here are the powers of the other 46 states to make the same imposition, unless the taxpayer is to be protected by the Commerce Clause. Here, the taxpayer need not wait for the legislature of Pennsylvania to act. The tax has been imposed. That the other 46 states may or may not act (and many have) is beside the point. If the tax is sustained then the *power* of all other states to tax the same revenue for the event of doing this business is established.

It is said that any increase in cost because of the tax, is not the basis for determining invalidity (Freeman v. Hewitt, 329 U. S. 256), but what is important is the deterrent effect of the tax sought to be sustained, and that is not precisely calculable until this Court decides the issue. It is enough to say that a double tax on the revenue may deter this sort of travel to the inconvenience and detriment of the taxpayer, and the traveling public for which it furnishes these services, as well as to other carriers in like position and the public they serve.

In summary, since the tax (a) is not on the subject of a "local" activity, viz: a privilege to do a "local" business, or on a franchise to conduct business as a corporation, or to use highways, or in lieu of a property tax, and (b) is unapportioned as to gross receipts and activities, with cumulative burdens not alone a risk, but a fact, it must be condemned.

III.

If the tax, as construed, be deemed not wholly invalid, the gross receipts from transportation outside of New York State may not be taxed.

The power of a state to tax, together with the limitations upon that power imposed by the Commerce Clause, has been the focal point of judicial determinations since the inception of our Government. In the adjustment to satisfy the needs for state revenue without impignment upon interstate commerce, delicate lines have been drawn.

While it has been said that "even interstate business must pay its way" (Western Livestock v. Bureau of Revenue, 303 U. S. 250, 254, quoting Postal Telegraph Cable Co. v. Richmond, 249 U. S. 252, 259), that language is used in the setting that those engaged in such commerce are not to be relieved from their just share of the state tax burden. Quickly this Court added, that local taxes measured by gross receipts from interstate commerce have often been pronounced unconstitutional (Western Livestock v. Bureau of Revenue, 303 U. S. 255).

The selection of a choice between the need for local revenue and protection of interstate commerce may, in the

case at bar, be regarded as unnecessary in the light of Ratterman v. Western Union Telegraph Co., 127 U. S. 411. That case recognizes that a single tax assessed under a state law upon the receipts of a telegraph company which were derived partly from interstate and partly from intrastate commerce, may be regarded as invalid only in proportion to the extent that such receipts were derived from interstate commerce. (See comments in Western Union Tel. Co. v. Steay, 132 U. S. 472.)

In the *Ratterman* case, the telegraph company was engaged in the transmission of messages between points in and outside the State of Ohio and between points within the State of Ohio. The Court found that the gross receipts from both types of transmission were factually separable and the Court adjudged invalid the collection of any receipts other than those derived from commerce entirely within the limits of the State of Ohio.

The claims of the appellant taxpayer in the case at bar were originally formed in the alternative below. Before the Commission, the issue was stated to the effect that if the tax was determined applicable the question arose as to "whether or not the receipts should be pro rated according to the mileage in and out of the State." (R. 18.) The evidence adduced by the Taxpayer showed a break-down of the revenue prorated (R. 29-32). The Commission in its conclusions of law held that there should be no proration (R. 34).

Before the Appellate Division, the Taxpayer argued, in the alternative, as that Court stated (R. 39), and before the Court of Appeals, the argument of the Taxpayer was that

> "* * * if the statute is construed to tax this kind of business it should be construed to tax only that proportion of its receipts attributable to mileage within this State." (R. 48.)

Without conceding that the entire revenue is taxable, it is urged that the exclusion of the revenue for the mileage traversed outside of New York State would mitigate the multiple or double taxation here involved. If the State of New York be confined to its taxes based upon the activities of the Taxpayer within its state, then so too may Pennsylvania be thus confined, and New Jersey likewise, with the sole effect upon the Taxpayer of paying taxes based upon truly apportioned methods. By such apportionment, the Taxpayer will pay a share of the cost of local government whose protection it enjoys. Again by stating the position of the taxpayer in the alternative, it should not be assumed that it regards itself as having paid less than its fair share for support of local government. Witness the other taxes imposed upon it.

With the fundamental rule firmly fixed that an unapportioned receipts tax on transportation is invalid, certainly an apportioned tax would seem to meet the economic, as well as the formal, lines drawn by this Court in its previous decisions.[32]

It is urged therefore that the revenue for the mileage traversed outside of New York State, 42.53% of the total mileage, be regarded as excluded from the base upon which the tax may be laid for the revenue here in dispute.

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[32] See the cases cited under Point II, B and footnote 28 herein.

IV.

The cases cited below require a reversal.

The Court below relied upon five cases to support its holding of validity. They are discussed seriatim.

(1) In Lehigh Valley Ry. Co. vs. Pennsylvania, 145 U. S. 192, the railroad transported passengers, but mostly freight, from Mauch Chunk, Pennsylvania to Philadelphia, Pennsylvania by a *continuous run* from Mauch Chunk to Phillipsburg, New Jersey, and from the latter city through New Jersey to Philadelphia, Pennsylvania. *There was no breaking of bulk or transfer of passengers in New Jersey* (145 U. S. at 201). Pennsylvania did not seek to tax the gross receipts for the freight or the passenger travel from Mauch Chunk to Philadelphia. Only that portion of the revenue attributable to the miles actually run in Pennsylvania (that is, from Mauch Chunk to Phillipsburg, New Jersey) was regarded as taxable. The case is therefore one where an *apportioned* tax was sustained.

It is clear from the facts in that case that, unlike the case at bar, passengers were not transferred in New Jersey. The extent of the activity of the railroad in New Jersey was, hence, considerably limited and may be regarded as minimal. In fact, it is significant that the Lehigh Valley Railroad had the alternative of using two routes from Mauch Chunk to Philadelphia—one by way of the Philadelphia and Reading road, being wholly within the State of Pennsylvania, and the other by its own line connecting with the lines of the Pennsylvania Railroad at Phillipsburg, New Jersey (145 U. S. at 199). The reasons why the Lehigh Valley Railroad chose to send a portion of its travel

through the out-of-state route do not appear in the decision, but the fact that it had a choice to use an indirect as well as a direct route is significant. In the case at bar, the direct route was used, and passengers serviced along the entire line. In the Lehigh Valley case, there is no reference whatsoever to passengers boarding the train or their being taken on at intermittent points on the direct route.

The limited nature of the holding in the Lehigh Valley case, as here interpreted, was approved by this Court in a subsequent case.

(2) In Hanley vs. Kansas City So. Ry. Co., 187 U. S. 617, the State of Arkansas asserted the right to fix rates for continuous transportation between two points in that state when a large part of the route was outside the state. The court stated that to say that this travel was confined to Arkansas would be a fiction, 187 U. S. at 620, (just as it would be fictional to claim that the transportation in the case at bar was confined to the State of New York). In preventing the State of Arkansas from fixing the rate, the Court made reference to the Lehigh Valley case (145 U. S. 192), characterizing it as one where "the tax 'was determined in respect to the receipts for the proportion of the transportation within the State'." (187 U. S. at 621).

Again, in the Hanley case, the traffic was continuous and the Court reiterates the rule, in effect, that an unapportioned tax on the gross revenue of a route which traverses outside of a state in which the termini are located, is invalid.

(3) In United States Express Co. vs. Minnesota, 223 U. S. 335, a tax was imposed upon the gross receipts of the express company for business done in the state. Under

the stipulated facts, the earnings, in part, consisted of earnings on express business of shipments delivered by the shipper to the express company in the State of Minnesota, consigned to an ultimate consignee at a second point in the State of Minnesota, which shipments were forwarded between the point of origin and point of destination over lines of a railroad which were partly within and partly without the State of Minnesota. The earnings *sought* to be taxed by the state were based upon the total earnings of those shipments and not that part of the earnings apportionable to the transportation which was performed within the State of Minnesota. It appeared that 91% of the mileage of such shipments was within Minnesota.

This Court, with reference to the facts just recited, said:

> "As to such shipments, the supreme court held that 9 per cent of the taxes claimed on this class of earnings should be deducted from the amount of the recovery allowed in the court of original jurisdiction, since it was disclosed that only 91 per cent of the mileage was within the state. For this part of the decision the Minnesota court relied upon Lehigh Valley R. Co. vs. Pennsylvania, 145 U. S. 192, 36 L. ed. 672, 1 Inters. Com. Rep. Sec. 7, 12 Sup. Ct. Rep. 806. An examination of that case shows that it is decisive of the present one on this point, and we need not further discuss this feature of the case." (223 U. S. at 342.)

This Court had before it the decision of the Supreme Court of Minnesota, which stated:

> "It perhaps does not appear as clearly as it might whether the recovery in that case (Lehigh Valley) was allowed for the entire earnings, or for a pro-

portion thereof based upon the mileage within the state; but we interpret the decision as allowing a recovery of taxes upon that proportion of the earnings derived from the carriage wholly within the state. This seems to us the safer rule and avoids any question of taxing interstate commerce and we adopt it and apply it to this case." (114 Minn. 346; 131 N. W. at 490.)

Again, an *apportioned* tax on the gross revenue of a route which traverses outside of a state in which the termini are located was valid, and the portion of the tax was sustained on the basis that it was "in lieu of all taxes" on the property. (223 U. S. 335, 336.)

The Court of Appeals, in discussing these three cases, *Lehigh Valley, United States Express Co.* and *Hanley,* sought to limit the holdings other than as indicated. The Court stated that no case had been cited where the United States Supreme Court had held that a tax on this type of transportation "must be limited" to receipts for mileage covered within the state of origin and terminus. (R. 48.) [33] It is respectfully submitted that the very language of this Court in the Express Company case, (223 U. S. 334 at 342) which states that the Lehigh Valley case is "decisive" of the present question, indicates that there is an express holding that the receipts "must be so limited." This con-

[33] The ninth line from the bottom on Page 48 of the Record contains a typographical error by the transposition of the letters "n" and "o". The ninth line from the bottom of R. 48 should read: "be noted here that the petitioner cites no case where the * * *.

clusion is reinforced by the fact that the Supreme Court of Minnesota had decided that the apportionment was required, relying upon the Lehigh Valley case, and this Court held it was decisive. The Court of Appeals sought to distinguish the *Hanley* case on the ground that it was a regulatory rather than a taxation question, yet the language in the *Hanley* case specifically interpreted the *Lehigh Valley* case as a proportioned tax case.

Reliance of the Court of Appeals upon the *Lehigh Valley* case should lead properly to reversal of the decision below.

The Court of Appeals cited two other cases in support of its conclusion that the commerce here involved was not interstate commerce.

(4) In People ex rel. Cornell Steamboat Company vs. Sohmer, 235 U. S. 549, a franchise tax was sustained, but the facts of that case indicated that the nature of the travel and the extent of the activity involved were quite different from that involved in the case at bar, and further the decision does not reveal that any claim was asserted that the gross revenue should be apportioned.

In that case, it appeared that the tax was imposed for towing charges upon the Hudson River. The business consisted largely of tows which were made up in the Hudson River at Albany, and thereupon the taxpayer attached a towing line connecting the tows with its tugs and moved the tows down or up river, leaving those tows upbound in the River at Albany, and those bound down the river, in the Bay at New York City. The facts also revealed that the tows for the up-river points were made at a stakeboat lo-

cated at Weehawken,[34] and vessels and boats going up the river are taken to those stakeboats, there made fast, and the tow is there made up. The course pursued by the steamers in going up the River was in the territory of New York and New Jersey. The decision further shows that it is absolutely impossible to state just when the vessels are within the territorial limits of either state (235 U. S. at 557.) The making up of the tows in the River below Weehawken was for "convenience in conducting domestic transportation." (235 U. S. at 560.)

The decision in the *Cornell* case indicates the minimal activity outside of New York State except for the plying of navigable waters up the Hudson River. No reference is made to transfers, lay-overs or stop-overs in the ports of New Jersey. It will be seen that the contacts and ties with the State of New Jersey are about limited to the touching of the waters which, as well, spill over the "line" into New York State. In the *Cornell* case, the taxpayer failed to show, though the opportunity was afforded to it before the Commission, the portion of the revenue attributable to its

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[34] The record on appeal indicates that even the stakeboats off Weehawken were within New York despite the statement in the decision, quoting an affidavit, to the contrary. (See Pages 20 and 21 in the record on appeal of the brief filed by the Attorney General.) It also appears that the tows may have passed through New Jersey, for the west half of the Hudson for about 10 miles. It was argued that because of the few miles navigated in New Jersey waters this was not interstate commerce. (Page 21 of brief of the Attorney General.)

towings outside of the State of New York, if there were any.

Lastly, the Cornell case is rested upon the convenience of the taxpayer in conducting domestic transportation. In the case at bar, what was involved was the convenience of conducting interstate transportation; namely, the servicing of the areas outside of New York State for not alone passengers who desired to go to points between the two states on tickets which so read, but for passengers who desired to go between the two states even though the ticket points of terminii were within New York State. It is submitted that the *Cornell* case does not stand for the proposition that an unapportioned gross receipts tax on interstate commerce is valid, for its conclusion is predicated upon the finding that it was not, in fact, interstate commerce, whereas no such finding of fact can properly be made in the case at bar. It is reiterated that the question of apportionment does not appear as having been raised in the *Cornell* case.

(5) In Ewing v. Leavenworth, 226 U. S. 464, this Court sustained, not a *gross receipts tax*, but a flat business and occupation tax of $50.00 which was imposed by the state on the business of receiving packages from points within the state and in transporting packages to like points. While the case was sustained as a privilege tax for the business done within the municipality, the so-called "interstate" aspect of the case could not and did not affect the size of the fee. While some of the packages delivered were transported into Missouri from Kansas and returned to Missouri, the case did not involve the imposition of a tax directly upon the revenue of such shipments. The case can

scarcely be cited for sustaining the contention that "this is not interstate commerce." All that the case decided was that there was no constitutional objection to the imposition of a flat occupation tax upon such business.

In summary, all of these cases cited above (1)-(5) and relied upon by the Court of Appeals below are distinguishable. When viewed in the light of the requirement for apportionment (*Lehigh Valley* and *United States Express Co.* cases) and distinctions based upon the *subject* of the tax (*Ewing* case—flat fee), and nature of the activity (*Cornell Steamboat* case—and failure to prove apportionment), these cases require a reversal of the decision below.

CONCLUSION.

JURISDICTION SHOULD BE TAKEN AND THE DECISION BELOW REVERSED.

The foregoing presentation, as to the merits of the case, and the nature of the substantial questions involved, indicates the need for reversal.

The impact of recent decisions of this Court upon old, but none the less revered, lines of authority, requires a decision.

This Court, with its ultimate power to adjust and accommodate the clash between the needs for State revenue and the needs of the Nation for freedom from obstruction of

interstate commerce, should make the determination and reverse the decision below.

All of which is respectfully submitted.

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October, 1947.

1400 State Tower Building,
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APPENDIX "A"

"

New York State Tax Law.

§ 186-a. Emergency tax on the furnishing of utility services

1. Notwithstanding any other provision of this chapter, or of any other law, a tax equal to two per centum of its gross income for the period from July first, nineteen hundred thirty-seven, to March thirty-first, nineteen hundred forty-four, is hereby imposed upon every utility doing business in this state which is subject to the supervision of the state department of public service which has a gross income for the twelve months ending May thirty-first in excess of five hundred dollars, except motor carriers or brokers subject to such supervision under article three-b of the public service law and a tax equal to two per centum of its gross operating income is hereby imposed for the same period upon every other utility doing business in this state which has a gross operating income for the twelve months ending May thirty-first in excess of five hundred dollars, which taxes shall be in addition to any and all other taxes and fees imposed by any other provision of law for the same period.

2. As used in this section, (a) the word "utility" includes every person subject to the supervision of either division of the state department of public service, except persons engaged in the business of operating or leasing sleeping and parlor railroad cars or of operating railroads other than street surface, rapid transit, subway and ele-

vated railroads, and also includes every person (whether or not such person is subject to such supervision) who sells gas, electricity, steam, water, refrigeration, telephony or telegraphy, delivered through mains, pipes or wires, or furnishes gas, electric, steam, water, refrigeration, telephone or telegraph service, by means or mains, pipes, or wires; regardless of whether such activities are the main business of such person or are only incidental thereto, or of whether use is made of the public streets; (b) the word "person" means persons, corporations, companies, associations, joint-stock associations, co-partnerships, estates, assignee of rents, any person acting in a fiduciary capacity, or any other entity, and persons, their assignees, lessees, trustees or receivers, appointed by any court whatsoever, or by any other means, except the state, municipalities, political and civil subdivisions of the state or municipality, and public districts; (c) the words "gross income" mean and include receipts received in or by reason of any sale, conditional or otherwise (except sales hereinafter referred to with respect to which it is provided that profits from the sale shall be included in gross income) made or service rendered for ultimte consumption or use by the purchaser in this state, including cash, credits and property of any kind or nature (whether or not such sale is made or such service is rendered for profit), without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services or other costs, interest or discount paid, or any other expense whatsoever; also profits from the sale of securities; also profits from the sale of real property growing out of the ownership or use of or interest in such property; also profit from the sale of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer

if on hand at the close of the period for which a return is made); also receipts from interest, dividends, and royalties, derived from sources within this state other than such as are received from a corporation a majority of whose voting stock is owned by the taxpaying utility, without any deduction therefrom for any expenses whatsoever incurred in connection with the receipt thereof, and also profits from any transaction (except sales for resale and rentals) within this state whatsoever; and (d) the words "gross operating income" mean and include receipts received in or by reason of any sale, conditional or otherwise, made for ultimate consumption or use by the purchaser of gas, electricity, steam, water, refrigeration, telephony or telegraphy, or in or by reason of the furnishing for such consumption or use of gas, electric, steam, water, refrigerator, telephone or telegraph service in this state, including cash, credits and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services or other costs, interest or discount paid, or any other expenses whatsoever.

3. Every utility subject to tax under this section shall keep such records of its business and in such form as the tax commission may require, and such records shall be preserved for a period of three years, except that the tax commission may consent to their destruction within that period or may require that they be kept longer.

4. [See also subd. 4 below] Every utility subject to tax hereunder shall file, on or before September twenty-fifth, December twenty-fifth, March twenty-fifth, and June twenty-fifth, a return for the three calendar months preceding each such return date including any period for which

the tax imposed hereby or by any amendment hereof is effective, each of which returns shall state the gross income or gross operating income for the period covered by each such return. Returns shall be filed with the tax commission on a form to be furnished by it for such purpose and shall contain such other data, information or matter as the tax commission may require to be included therein. Notwithstanding the foregoing provisions of this subdivision, any utility whose average gross income or average gross operating income, as the case may be, for the aforesaid three months' periods is less than fifteen hundred dollars, may file its returns for such periods on June twe -fifth, nineteen hundred thirty-nine, June twenty-fifth, nineteen hundred forty, June twenty-fifth, nineteen hundred forty-one, June twenty-fifth, nineteen hundred forty-two, June twenty-fifth, nineteen hundred forty-three, and June twenty-fifth, nineteen hundred forty-four, respectively. The tax commission, in order to insure payment of the tax imposed by this section, may require at any time a return, which shall contain any data specified by it. Every return shall have annexed thereto an affidavit of the head of the utility making the same, or of the owner or of a co-partner thereof, or of a principal officer of the corporation, if such business be conducted by a corporation, to the effect that the statements contained therein are true.

4. [See also subd. 4 above] Every utility subject to tax hereunder shall file, on or before September twenty-fifth, December twenty-fifth, March twenty-fifth, and June twenty-fifth, a return for the three calendar months preceding each such return date including any period for which the tax imposed hereby or by any amendment hereof is effective, each of which returns shall state the gross income or

gross operating income for the period covered by each such return. Returns shall be filed with the tax commission on a form to be furnished by it for such purpose and shall contain such other data, information or matter as the tax commission may require to be included therein. Notwithstanding the foregoing provisions of this subdivision, any utility whose average gross income or gross operating income, as the case may be, for the aforesaid three months' periods is less than fifteen hundred dollars, may file its returns for such periods on June twenty-fifth, nineteen hundred thirty-nine, June twenty-fifth, nineteen hundred forty, June twenty-fifth, nineteen hundred forty-one, June twenty-fifth, nineteen hundred forty-two, and June twenty-fifth, nineteen hundred forty-three, respectively, and the tax commission may require any utility to file an annual return, which shall contain any data specified by it, regardless of whether the utility is subject to tax under this section. Every return shall have annexed thereto an affidavit of the head of the utility making the same, or of the owner or of a co-partner thereof, or of a principal officer of the corporation, if such business be conducted by a corporation, to the effect that the statements contained therein are true.

5. At the time of filing a return as required by this section, each utility shall pay to the tax commission the tax imposed by this section for the period covered by such return. Such tax shall be due and payable at the time of filing the return or, if a return is not filed when due, on the last day on which the return is required to be filed.

6. In case any return filed pursuant to this section shall be insufficient or unsatisfactory to the tax commission, and

if a corrected or sufficient return is not filed within twenty days after the same is required by notice from the tax commission, or if no return is made for any period, the tax commission shall determine the amount of tax due from such information as it is able to obtain, and, if necessary, may estimate the tax on the basis of external indices or otherwise. The tax commission shall give notice of such determination to the person liable for such tax. Such determination shall finally and irrevocably fix such tax, unless the person against whom it is assessed shall, within thirty days after the giving of notice of such determination, apply to the tax commission for a hearing, or unless the tax commission, of its own motion shall reduce the same. After such hearing, the tax commission shall give notice of its decision to the person liable for the tax. The decision of the tax commission may be reviewed by certiorari, if application therefor is made within thirty days after the giving of notice of such decision. An order of certiorari shall not be granted unless the amount of any tax sought to be reviewed, with penalties thereon, if any, shall be first deposited with the tax commission and an undertaking filed with it, in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that, if such order be dismissed or the tax confirmed, the applicant for the order will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding, or at the option of the applicant, such undertaking may be in a sum sufficient to cover the tax, penalties, costs and charges aforesaid, in which event the applicant shall not be required to pay such tax and penalties as a condition precedent to the granting of such order.

7. The same remedies shall be available for the recovery of any tax or penalty imposed by this section as are

available for the recovery of other taxes and penalties imposed by this article.

8. Any notice authorized or required under the provisions of this section may be given by mailing the same to the person for whom it is intended, in a postpaid envelope, addressed to such person at the address given by him in the last return filed by him under this section, or, if no return has been filed, then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time, which is determined according to the provisions of this section by the giving of notice, shall commence to run from the date of mailing of such notice.

9. Any person failing to file a return or corrected return, or to pay any tax or any portion thereof, within the time required by this section shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof, excepting the first month, after such return was required to be filed or such tax became due; but the tax commission, if satisfied that the delay was excusable, may remit all or any portion of such penalty.

10. If, within one year from the payment of any tax or penalty, the payer thereof shall make application for a refund thereof and the tax commission or the court shall determine that such tax or penalty or any portion thereof was erroneously or illegally collected, the tax commission shall refund the amount so determined. For like cause and within the same period, a refund may be so made on the initiative of the tax commission. However, no refund shall

be made of a tax or penalty paid pursuant to a determination of the tax commission as hereinbefore provided unless the tax commission, after a hearing as hereinbefore provided; or of its own motion, shall have reduced the tax or penalty or it shall have been established in a certiorari proceeding that such determination was erroneous or illegal. All refunds shall be made out of moneys collected under this article deposited to the credit of the comptroller, with the approval of the comptroller. An application for a refund, made as hereinbefore provided, shall be deemed an application for the revision of any tax or penalty complained of and the tax commission may receive additional evidence with respect thereto. After making its determination, the tax commission shall give notice thereof to the person interested, and he shall be entitled to a certiorari order to review such determination, subject to the provisions hereinbefore contained relating to the granting of such an order.

11. If any provision of this section conflicts with any other provision contained in this article, the provision of this section shall control, but the provisions of this article which do not conflict with the provisions of this section shall apply with respect to the taxes under this section, so far as they are, or may be made, applicable.

12. The tax imposed by this section shall be charged against and be paid by the utility and shall not be added as a separate item to bills rendered by the utility to customers or others but shall constitute a part of the operating costs of such utility.

13. Notwithstanding any other provision contained in this or any other law, in the event the city of New York

shall enact a local law imposing a tax on utilities, such as is imposed by this section, except as to the rate of tax, the tax commission, in its discretion, may arrange with the chief fiscal officer of said city for the collection by him of the tax imposed by this section with respect to items that enter into the tax base for both the tax imposed by said city and that imposed pursuant to this section, and for the remittance by him of the tax imposed by this section to the tax commission for disposition as in this article provided. If such an arrangement be made, all the provisions of the local law of said city imposing the local tax shall apply with respect to the tax imposed by this section in the same manner as if the local tax rate had included the tax imposed by this section.

14. The remedy provided by this section for review of a decision of the tax commission shall be the exclusive remedy available to any taxpayer to judicially determine the liability of such taxpayer for taxes under this section." Added L. 1937, c. 321, §1; amended L. 1938, cc. 67, 293, 384, 710; L. 1939, c. 936, §1; L. 1940, c. 131, §1; L. 1940, c. 494; L. 1941, c. 137, §2; L. 1942, c. 168, §1; L. 1942, c. 780; L. 1943, c. 120, §1, eff. March 16, 1943; L. 1943, c. 260, eff. April 3, 1943; L. 1943, c. 424, §1, eff. April 13, 1943. Further amended L. 1944, c. 115, §1; L. 1945, c. 120, §1; L. 1946, c. 110, §1; L. 1947, c. 89, §1, eff. April 1, 1947.

APPENDIX "B"

New York State.

Legislative intent; effective date; retroactive effect. L. 1941, c. 137, §§1, 3, 4, provided as follows:

"Section 1. Declaration of legislative intent. The two per cent tax on persons selling or furnishing utility services imposed by section one hundred eighty-six-a of the tax law was enacted on May seventh, nineteen hundred thirty-seven, upon the recommendation of the governor as an emergency measure to aid in financing the extraordinary cost of relief. The governor's recommendation was that the tax be imposed on the furnishing of 'utility services.' It was intended to impose a tax on such services whether rendered by utilities in the strict sense or not, whether such services were the main or incidental part of their business and regardless of whether the public streets were used in any manner. Accordingly, the law defined a utility, for the purposes of the tax, as including every person subject to the supervision of the department of public service and every other person furnishing utility services. It was intended to include persons and corporations which were directly in competition with ordinary utilities, such as, landlords and submeterers, who buy their services from other utilities and, in turn, resell such services. For that reason the tax was imposed on receipts from sales to ultimate consumers. Receipts from the sale of such utility services to submeterers were not taxed, but receipts of submeterers from their own customers were intended to be taxed. Any other construction would have resulted in a complete exemption from taxation of utility services sold or furnished by this particular method. Accordingly, prior

to a decision by the court of appeals, which decided that submeterers were not subject to the tax, these submeterers considered themselves as taxable and their charges to their customers took into consideration as part of their operating cost the additional burden of the tax.

"In view of the fact that these landlords or submeterers have considered themselves as subject to tax, have based their charges to their customers in consideration of the tax and are in competition with ordinary utilities, this act, making it clear that they are required to include in gross operating income receipts from sales or services similar to those rendered by ordinary utilities, is made retroactive to the original enactment of this tax.

"Furthermore, it is believed that submeterers have common characteristics that distinguish them from other businesses and justify the conclusion that the method, character and nature of their business, in this aspect, is substantially similar to the business of an ordinary utility and requires similar treatment for purposes of the tax. This conclusion is strongly fortified by the fact that such landlords and submeterers are in direct competition with ordinary utilities, and hence should bear similar tax burdens in order to avoid inequality of treatment."

"§3. This act shall take effect immediately. The amendments made by this act to subdivision two of section one hundred eighty-six-a of the tax law shall be deemed to have the same force and effect as if enacted on May seventh, nineteen hundred thirty-seven, and the tax imposed or continued by this act shall be deemed to have been validly enacted as of such date and continued from year to year by the amendments made to subdivision one of said section.

"§4. In the event that the amendments made to subdivision two of section one hundred eighty-six-a of the tax law by this act are declared by a court of competent jurisdiction to be invalid to the extent that they are made retroactive to May seventh, nineteen hundred thirty-seven, then the tax imposed or continued by such amendments shall be applicable to recent transactions since January first, nineteen hundred forty."

APPENDIX "C"

Pennsylvania Law.

(1) Motor Vehicle Carriers

Act of June 22, 1931, P. L. 694

"Sec. 1. Excise tax on gross receipts; transportation companies using public highways; definitions.—That the word "company" as used in this Act, shall be construed to mean any individual who, or copartnership, corporation, joint-stock association, or association of individuals whatsoever which, shall engage in the business of carrying passengers or property for hire over the highways of this Commonwealth in motor vehicles or trackless trolleys. For the purposes of this Act, the term "motor vehicle" shall be construed to mean every vehicle which is self-propelled, except such as move upon or are guided by a track erected upon the highways.

Sec. 2. Semi-annual report to be filed with the Department of Revenue.—Each company shall pay an excise tax for the use of the highways of this Commonwealth. For the purpose of ascertaining the amount to be paid, each

such company shall, on or before the first day of February of each year, file with the Department of Revenue, on forms prescribed and furnished by it, a report, under oath or affirmation, setting forth: (1) The name and address of the company owning or operating such motor vehicle or vehicles; (2) the location of the principal place of business of such company; (3) the name and address of the person in this Commonwealth upon whom service of process or other notice may be had against such company; (4) a schedule, if any, if not, a description of the routes over which such company shall have operated over the highways in this Commonwealth during the period for which the report is filed; (5) the number of miles of all routes over which such motor vehicle or motor vehicles shall have been operated by such company during the period for which the report is filed; (6) the number of miles within this Commonwealth of all such routes so operated during the period for which the report is filed; and (7) the amount of gross receipts of such company from all sources upon its operations during the period for which the report is filed, and such other relevant information as the Department of Revenue may require in connection with the settlement of the excise tax hereinafter provided, for the calendar year immediately preceding the first day of January of each year. (*As amended by Act of June 5, 1947, No. 204, effective immediately.*)

Sec. 3. Amount of tax; deductions.—The amount of excise tax annually to be paid by each company specified in Section one of this act shall be as follows: (1) In case of a company operating routes which are entirely within the limits of this Commonwealth, eight (8) mills upon the dol-

lar upon the gross receipts of such company from all operations for the period covered by such report; and (2) in case of a company operating over routes when only a part of such routes lies within this Commonwealth, eight (8) mills upon the dollar upon such portion of the gross receipts of such company as is represented by the ratio that the number of miles of routes operated in this Commonwealth by such company, during the period for which the report is filed bears to the total number of miles of all routes operated by such company during said period. The provisions hereof shall not be construed as exempting any company from complying with the laws relating to fees payable to the Department of Revenue for the registration of motor vehicles. In the event, however, that an excise tax shall be paid by any company to any city of this Commonwealth for the use of its highways, during the period for which the report is filed, the amount of such tax, so paid, may be deducted from the amount of tax payable to the Commonwealth, as above computed, upon satisfactory proof to the Department of Revenue of such payment; and, in addition thereto, where any such company shall have paid to the Department of Revenue a registration fee or fees, as provided for by the laws of this Commonwealth, upon any motor vehicle or motor vehicles used in the business of carrying passengers or property for hire over the highways of this Commonwealth, it shall receive a credit in each settlement for gross receipts tax made hereunder to the extent of the total amount of the registraion fee or fees paid for the calendar year of which the period covered by the settlement was a part. (*As amended by Act of June 5, 1947, No. 204, effective immediately.*)"

(2) Franchise Tax.

* * * * *

(b) *Tax of five mills on capital stock of foreign corporation, etc.; the actual value of whole capital stock shall be divided into 3 equal parts.*—Every foreign corporation, joint-stock association, limited partnership, and company whatsoever, from which a report is required under the twentieth section hereof, shall be subject to and pay into the treasury of the Commonwealth annually, through the Department of Revenue, a franchise tax at the rate of five mills upon a taxable value to be determined in the following manner. The actual value of its whole capital stock of all kinds, including common, special, and preferred, shall be ascertained in the manner prescribed in the twentieth section of this act, and shall then be divided into three equal parts. (*As added by Act of May* 16, 1935, *P. L.* 184.)

* * * * *

(3) Of the remaining third, such portion shall be attributed to business carried on within the Commonwealth, as shall be found by multiplying said third by a fraction, whose numerator is the amount of the taxpayer's gross receipts from business, not strictly incident or appurtenent to manufacturing in this Commonwealth assignable to this Commonwealth as hereinafter provided, and whose denominator is the amount of the taxpayer's gross receipts from all its business. (*As added by Act of May* 16, 1935, *P. L.* 184 *and as amended by Act of May* 27, 1943, *P. L.* 762.)

* * * * *

Amount of gross receipts from business assignable to the Commonwealth; if a taxpayer maintains office, etc., outside

of State to reduce the amount of tax.—The amount of the taxpayer's gross receipts from business assignable to this Commonwealth shall be (1) the amount of its gross receipts for the taxable year, except those negotiated or effected in behalf of the taxpayer by agents or agencies chiefly situated at, connected with, or sent out from premises for the transaction of business maintained by the taxpayer outside the Commonwealth, and except rents and royalties, and interest and dividends, (2) rentals or royalties from property situated or from the use of patents within this Commonwealth, and (3) dividends and interest, except such dividends and interest attributable to the business conducted on premises maintained by the txpayer outside the Commonwealth. If a taxpayer maintains an office, warehouse, or other place of business in a state other than this Commonwealth for the purpose of reducing its tax under this subsection, the Department of Revenue shall, in determining the amount of its gross receipts from business assignable to this Commonwealth, include therein the gross receipts attributed by the taxpayer to the business conducted at such place of business in another state. (*As added by Act of May* 16, 1935, *P. L.* 184; *and as amended by Act of April* 8, 1937, *P. L.* 239; *Act of May* 16, 1945, *P. L.* 606.)


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